

The ALJ awarded claimant an 8 percent permanent partial disability to the body as whole based on the functional impairment rating given by Dr. Reiff Brown, the independent medical examiner appointed pursuant to K.S.A. 44-510e(a). The ALJ went on to conclude

claimant was not entitled to work disability as she consistently earned in excess of 90 percent of her pre-injury average weekly wage.<sup>1</sup> Thus, her recovery was limited to her functional impairment and calculated based upon an average weekly wage of \$129.73. This was based upon the ALJ's finding that claimant was a seasonal or temporary employee earning \$6.25 per hour and was not a full-time employee at the time of her injury.

The claimant requests review of the nature and extent of her impairment, along with her entitlement to a work disability. And claimant appeals the ALJ's finding with respect to her average weekly wage. Claimant asserts that she was not only a full-time permanent employee, expecting to earn \$6.25 an hour for 32-36 hours per week, but that since leaving respondent's employ, she has worked for various employers, but has not been able to maintain her employment and has thus sustained a 57 percent wage loss.<sup>2</sup>

Respondent argues that the ALJ's decision should be affirmed in all respects.

The only issues for the Board's consideration are the nature and extent of claimant's impairment and claimant's average weekly wage at the time of her injury.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began working for respondent in November of 2000 as a seasonal employee assigned to work as a cashier. She was paid \$6.25 per hour and according to her, believed she would be working 32-36 hours per week. In addition, claimant testified that in the first or second week of December, she was told she would be retained as a full-time employee.<sup>3</sup> She does not specifically recall who gave her this information, nor the precise date it occurred.

The payroll records contained within the record show that claimant worked a total of 89.05 hours up to the time of her accident. Excluding the week of claimant's injury and those weeks in November and December that she did not work at all, claimant has a work history with respondent of 4.29 weeks. When 89.05 is multiplied by her \$6.25 hourly rate,

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<sup>1</sup> The ALJ made no express findings as to claimant's good faith effort to retain her employment or find work during her subsequent periods of unemployment.

<sup>2</sup> This 57 percent figure is asserted in claimant's brief to the Board fax filed on August 18, 2005.

<sup>3</sup> R.H. Trans. (Mar. 15, 2005) at 16.

claimant's gross earnings for the period is \$556.56 and when divided by the number of weeks, 4.29, the average is \$129.73, the sum found by the ALJ.

There is no documentation within claimant's personnel file that reflects a change in her employment status from a part-time seasonal employee. Claimant's last day of employment was February 23, 2001. According to Joyce Collins, the respondent's personnel manager, claimant is not eligible for rehire, nor would she have been recommended for full time status because claimant was not a dependable employee. The time records show that claimant consistently failed to show up for work as scheduled, both before and after her injury.<sup>4</sup>

The ALJ concluded that claimant was a part-time seasonal employee and based her average weekly wage calculation upon claimant's actual hours worked during the 4.29 weeks before her injury. The Board affirms this reasoning and the ultimate average weekly wage of \$129.73. Like the ALJ, the Board is not persuaded that claimant was anything other than a part-time seasonal employee who was never converted to a full-time employee.

On December 22, 2000, claimant was assisting a customer with a heavy item when something in her left shoulder between her shoulder blades popped. Claimant proceeded to inform her manager who referred her to a local hospital and later to an occupational health facility. After the accident, claimant began having neck and upper back complaints. She also voiced complaints about bilateral hand numbness. Over time claimant complained of problems in her low back and right side along with a twitch in her left eye.

After a period of treatment with Dr. Dobyns, claimant was referred to Dr. Frederick Smith on March 30, 2001. Claimant's complaints included upper thoracic sprain with complaints of cervical and low back pain.<sup>5</sup> She also complained of neck stiffness and pain in the upper trapezius area on the left and intermittent numbness in the upper extremities. Claimant indicated to Dr. Smith that she wakes up in the night with a feeling of coldness and numbness in her hands, which goes up into her forearms and elbows. Claimant also had shoulder pain more on the left and intermittent burning pain in her legs with back discomfort when ambulating.<sup>6</sup> Dr. Smith assessed that claimant mainly had musculoskeletal problems and possibly carpal tunnel, but he believed that her psychological issues were affecting her interpretation of how she was feeling. Dr. Smith recommended that claimant undergo physical therapy three times a week and gave claimant wrist splints to wear at night.

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<sup>4</sup> Collins Depo. at 20.

<sup>5</sup> Smith Depo., Ex. 2 at 23.

<sup>6</sup> *Id.*

On May 4, 2001, claimant had a nerve conduction study (NCS) after which she was diagnosed with bilateral carpal tunnel with no evidence of any radiculopathy, plexopathy or other peripheral nerve involvement. Dr. Smith found that claimant was at maximum medical improvement and released her to return to regular duty. Claimant was not given any restrictions, but was instructed to continue exercising and wearing her splints at night. Claimant was rated with a 3 percent impairment for her myofascial pain and symptoms based upon the 4<sup>th</sup> edition of the *AMA Guides*.<sup>7</sup>

At respondent's request, claimant saw Dr. Paul S. Stein on July 19, 2002. Her chief complaints were pain involving her neck and upper extremities. She also complained of numbness and tingling from the base of her neck down between her shoulder blades and down her left upper extremity all day long. Claimant indicated to Dr. Stein that all of her symptoms in her neck, upper back, arms, spine and nausea were related to her injury at Wal-Mart.

After examination of claimant and the records of her prior treatment, Dr. Stein opined the following:

Based on available medical records, the prolonged history given today as well as my examination it is my opinion that the only injury sustained by this patient on 12/21/00 at Wal-Mart was some myofascial strain in the left cervical/trapezius region. I believe that her other symptomatology is related to carpal tunnel syndrome, possible systemic effects from septicemia, aggravation by subsequent work activity and likely a psychogenic component.<sup>8</sup>

Dr. Stein believed that claimant was at maximum medical improvement and rated her with a 5 percent whole person impairment for myofascial strain based on the DRE cervicothoracic category II. He indicated that there was no structural pathology to provide work restrictions, and that the only restrictions that could be imposed would have to be based on claimant's subjective discomfort and would be to alternate between sitting, standing, and walking.

At her lawyer's request, claimant saw Dr. Pedro Murati on May 5, 2003. Dr. Murati diagnosed bilateral carpal tunnel syndrome, right ulnar cubital syndrome, myofascial pain syndrome affecting the left shoulder and neck and upper motor neuron lesion affecting the left upper extremity, etiology unknown.<sup>9</sup> Dr. Murati assigned the following restrictions based on an 8 hour day of no climbing ladders, crawling, heavy grasping over 40

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<sup>7</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4<sup>th</sup> ed.). All references are to the 4<sup>th</sup> ed. of the *Guides* unless otherwise noted.

<sup>8</sup> Stein Depo., Ex. 2 at 6.

<sup>9</sup> Murati Depo., Ex. 2 at 3.

kilograms, no work above shoulder level, no lifting, carrying, pushing, pulling over 20 pounds, no work more than 18 inches from the body, no using hooks or knives or vibratory tools. Claimant was instructed to use wrist splints at home and work, and was told she could occasionally grasp repetitively 20 pounds and use frequent hand controls up to 10 pounds.<sup>10</sup>

Dr. Murati testified that he merely assumed that claimant's carpal tunnel complaints were due to a repetitive work environment and as a result, opined that claimant's diagnosis was a direct result of the work-related injury on December 22, 2000 during her employment with Wal-Mart. When questioned about the basis of his assumption, he conceded that he knew little about her job with subsequent employment tasks and the impact those jobs might have on her present condition. He was asked to "break out" that portion of the bilateral upper extremity problems and rate the remaining permanent conditions. For the myofascial pain syndrome affecting the left shoulder and neck he assigned a 5 percent permanent partial impairment to the whole body.

Dr. Murati assigned claimant a 10 percent impairment to the right upper extremity for carpal tunnel syndrome, 10 percent for right elbow pain secondary to ulnar cubital syndrome, these impairment combine for a 19 percent impairment to the right upper extremity, which converts to a 11 percent whole person impairment. He also assigned 10 percent impairment to the left upper extremity for carpal tunnel syndrome, which converts to a 6 percent whole person impairment and a 5 percent whole person impairment for myofascial pain syndrome affecting the cervical spine. Using the combined values chart on page 322 of the *AMA Guides* the whole person impairments combine for a 20 percent whole person impairment.<sup>11</sup>

Claimant also saw Dr. Reiff Brown on September 22, 2003 at the request of the ALJ and pursuant to K.S.A. 44-510e(a). At that time claimant was still having left shoulder problems, and her numbness and discomfort if she remained in one position for too long, or if she vigorously moved around. Claimant's carpal tunnel had been resolved with surgery.

Dr. Brown opined that claimant as a result of her accident suffered a strain or sprain of the musculature of her left shoulder and cervical area as well as a tear or sprain of the rotator cuff, which led to pain and loss of range of motion. It is Dr. Brown's opinion that claimant developed a mild impingement syndrome and a capsular fibrosis that was related to her loss of range of motion in her shoulder. Since claimant's discomfort was continual, the doctor believed that claimant's injury was an aggravation of pre-existing degenerative changes in the cervical area. He opined that he had "difficulty relating her low back

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<sup>10</sup> *Id.*, Ex. 2 at 6.

<sup>11</sup> *Id.*, Ex. 2 at 4-5.

symptoms to the December 22, 2001 [sic] injury and I suggest she may have chronic strain largely from physical deconditioning responsible for those symptoms.”<sup>12</sup>

Dr. Brown found claimant to be at maximum medical improvement and assigned a 5 percent whole body impairment based on the DRE Cervical Thoracic Category II and a 5 percent impairment of the left upper extremity as a result of loss of range of motion of the left shoulder, and an 8 percent permanent partial impairment of function of the whole body as a result of the December 22, 2000 injury. Dr. Brown imposed permanent restrictions of avoiding work that involves frequent flexion, extension and rotation of the neck greater than 30 degrees, frequent use of the left hand above shoulder level and frequent reach away from the body more than 18 inches with the left upper extremity.<sup>13</sup>

Jerry Hardin was asked to provide a task assessment. After an interview with claimant on June 9, 2003, Mr. Hardin outlined a total of 92 tasks. At his deposition Mr. Hardin acknowledged claimant was capable of earning a wage comparable to what she earned while in respondent's employ. In fact, since leaving respondent's employ, claimant has worked for a variety of employers, earning more than she had for this respondent. Claimant earned \$298.40 per week working for Wesley Medical Center<sup>14</sup> and \$336.00 per week with a temporary service. She was also employed as a youth care worker earning \$7.75 per hour working 24 hours per week.

Dr. Brown reviewed Mr. Hardin's task assessment and agreed that claimant has a 48 percent (unduplicated) task loss. Similarly, Dr. Murati testified that claimant bore a 49 percent (unduplicated) task loss. Dr. Stein, on the other hand, imposed no restrictions and thus found a 0 percent task loss.

The ALJ was more persuaded by the opinions offered by the IME physician Dr. Brown and awarded claimant an 8 percent functional impairment to the whole body. The Board has considered the parties' arguments and finds no reason to disturb that finding. Each of the physicians who testified, including Dr. Brown, generally concluded that claimant's shoulder and upper back complaints, along with the myofascial pain, are attributable to her work-related injury of December 22, 2000. Thus, it is reasonable under these circumstances to rely upon the medical opinion and analysis provided by the independent medical examiner. In making this determination, the Board specifically excludes any compensation for the bilateral carpal tunnel complaints as it is not persuaded that claimant sustained such an injury in her work related accident. The only physician to make this causational jump was Dr. Murati and even he admitted that he *assumed* claimant was performing a repetitive job which gave rise to her bilateral complaints. This is not a

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<sup>12</sup> Brown Depo., Ex. 2 at 4.

<sup>13</sup> *Id.*

<sup>14</sup> Claimant worked at this employer beginning in April 2002 and remained there for a year.

repetitive injury claim. Rather, claimant is entitled to recover for only those injuries she sustained in the single acute injury she sustained on December 20, 2000 while in respondent's employ.

The Board likewise affirms the ALJ's conclusion that claimant is not entitled to a work disability. Permanent partial general (work) disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

. . . The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Since leaving respondent's employ, claimant has held a variety of jobs, each of which paid in excess of the hourly rate she was receiving while working for respondent. These jobs paid her anywhere from \$7.50 to \$9.00 per hour. During some of this time she has also attended college full-time while still working. When these hourly wages are compared to the wage she was earning while in respondent's employ, it is clear that claimant is not just earning a comparable hourly wage, but has earned more than she did before her injury, at least during those periods she was working.

As the Board indicated at the oral argument, the record is rather murky as to claimant's periods of employment following her departure from her job with this respondent. Likewise, the record is equally unclear as to the reason she left some of these positions. The parties are reminded that in order to establish or defend against a claim for work disability under K.S.A. 44-510e(a) a time line establishing post-injury employment and wages is not only helpful, but inherently necessary.

Here, claimant had a series of positions, one for as long as a year, interspersed with periods of unemployment following her dismissal from respondent's employ. Assuming all the requisites of a work disability are met, an Award would have to be fashioned to reflect the changing percentages of work disability. However, based upon this record, such a calculation would be impossible.

Claimant's counsel attempted to cure this defect by filing a letter with the Board following oral argument. However, that letter cannot be considered as evidence as it was

not presented in the form of a stipulation. While the Board is empowered to engage in a *de novo* review of this claim, it cannot consider evidence that was not presented to the ALJ.

The ALJ declined to award any work disability as she concluded the claimant returned to work following her injury and has consistently earned in excess of 90 percent of her pre-injury wage. She made this determination by comparing claimant's pre-injury hourly wage as a part-time seasonal worker with her hourly wage after her injury. The Board agrees with this analysis and affirms this conclusion. Because claimant has returned to a comparable wage job with respondent she is limited to an award based solely upon the percentage of her functional impairment.<sup>15</sup>

All other findings are hereby affirmed as if fully set forth herein to the extent they are not inconsistent with the above.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated March 1, 2005, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant  
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>15</sup> K.S.A. 44-510e(a).